Institute for Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

March 16, 2020

To: Office of Energy Efficiency and Renewable Energy, Dept. of Energy

Subject: Comments on Supplemental Notice of Proposed Rulemaking on Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards (85 Fed. Reg. 8483, Feb. 14, 2020)

Docket: EERE-2015-BT-STD-0062

The Institute for Policy Integrity at New York University School of Law[1] respectfully submits these comments on the Department of Energy's supplemental proposed changes to its Process Rule.[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

The Department of Energy proposes that—rather than maximizing improvements in energy efficiency by selecting the most stringent technologically feasible standard for which benefits exceed burdens[3]—the agency will instead analyze the costs and benefits of all technologically feasible options but then exclude certain efficiency levels as not "economically justified"[4] on the grounds of certain "adverse economic impacts" such as effects to small businesses, market competition, or consumer convenience.[5] The Department argues that its proposed changes will ensure that such adverse effects will be considered more "consistently" when applying the statutory factors to select an efficiency standard.[6]

In fact, the proposed change will not ensure consistent consideration of the statutory factors. To the contrary, the proposed change will allow the Department to irrationally and inconsistently give preference to whichever subset of economic impacts the Department wants to focus on in order to deem standards that otherwise achieve net benefits as instead being *not* economically justified.[7] As the Department's own examples demonstrate, the proposed change would allow the Department, for instance, to deem a trial standard level (TSL) that has benefits exceeding burdens, and that would maximize energy savings, as instead not economically justified simply because of impacts to small businesses.[8] The proposed change offers no guidance on what magnitude of impact to small businesses is required to trump all other cost-benefit calculations and statutory factors in this way—seemingly, any adverse impact on small businesses could be labeled as "significant" and used as pretense for the Department to redefine a TSL as not economically justified.

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[1] This document does not purport to present New York University School of Law's views, if any.

[2] 85 Fed. Reg. 8483 (Feb. 14, 2020).

[3] *See* 42 U.S.C. § 6295(o)(2)(A) & (B).

[4] 85 Fed. Reg. at 8486 (after discussing two possible TSLs that both have monetized benefits exceeding costs, nevertheless arguing that "if, for example, the TSL with the slightly higher energy savings also has a significant, adverse impact on small business manufacturers as compared to the other TSL, it could be difficult to argue that it is economically justified.").

[5] *Id.* at 8486-87.

[6] *Id.* at 8487.

[7] *See id.* (explaining that the proposed rule change would sometimes give preference to the standard that maximizes net benefits, yet other times instead give preference to the standard that optimizes consumer savings, or that minimizes negative impacts to either consumers or manufacturers, or that factors in consumer convenience—all without explaining any rational principle to guide which subset of effects the Department chooses to give priority in any particular proceeding).

[8] *Id.* at 8486.

Certainly, a standard's impact to manufacturers (whether the manufacturers are large or small) is an important factor that the statute instructs the Department to weigh in assessing whether a standard is economically justified.[9] But the statute does not allow the Department to pick and choose which subset of factors it wants to give controlling weight to in any particular determination. Instead, the statute instructs the Department to consider not just impacts to manufacturers, but impacts to consumers, cost savings, energy savings, product performance, market competition, and the need for national energy conservation[10]—the last of which includes environmental, grid reliability, and national security impacts.[11] More broadly, all these factors are merely elements of the broader determination required by statute of whether "the benefits of the standard exceed its burdens."[12]

The way to consistently balance all the relevant factors is through a thorough and transparent cost-benefit analysis. The cost-benefit analysis should consider not just monetized costs and benefits but also any important yet hard-to-quantify effects. In this way, for example, impacts to small businesses neither can become a potentially controlling factor and be used at the Department's whim to override all other considerations (as the proposed rule change would allow), nor are they ignored in the calculus (as the Department seemingly, but unfoundedly, fears would be the case without the proposed rule change). Instead, impacts to small businesses should be quantified to the extent possible and then weighed against all other important costs and benefits, including the environmental benefits of energy efficiency. While there is certainly some value in protecting small businesses,[13] selecting a standard that would reduce energy efficiency in order to protect small businesses also comes at a real cost—perhaps a very significant cost to consumers, the environment, and the need for national energy conservation. All those costs and benefits should be balanced in a transparent analysis, and the mere existence of one subset of adverse impacts should not render an otherwise net beneficial standard as *not* economically justified.

Because the proposed regulatory change would allow the Department to define "economically justified" not on the basis of whether a standard's benefits exceed its burdens, nor on whether a standard would maximize net benefits, but instead based on seemingly any subset of adverse impacts to which the

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[9] 42 U.S.C. § 6295(o)(2)(B)(i)(I).

[10] *Id.* § 6295(o)(2)(B)(i)(I)-(VII).

[11] The Department has recently acknowledged that when assessing the "need for national energy conservation" factor, the Department normally analyzes environmental benefits, including reduced greenhouse gas emissions and air pollution associated with fossil-fuel based energy production, as well as benefits to the reliability of the nation's energy system and to national security that come from reduced overall energy demand. *E.g.,* Energy Conservation Program: Energy Conservation Standards for General Service Incandescent Lamps, 84 Fed. Reg. 46,830, 46,835 (Sept. 5, 2019). In 2016, the U.S. Court of Appeals for the Seventh Circuit concluded that: "To determinate whether an energy conservation measure is appropriate under a cost-benefit analysis, the expected reduction in environmental costs *needs to be taken into account*." *Zero Zone, Inc. v. Dept. of Energy*, 832 F.3d 654, 677 (7th Cir. 2016) (emphasis added). *See also id* at n.24 (further concluding that the agency also likely had the authority, if not the requirement, to consider environment effects under the first statutory factor on economic impacts, because "[e]nvironmental benefits have an economic impact"). Interpreting nearly identical statutory language that EPCA applies to the Department of Transportation's setting of vehicle efficiency standards ("the need of the United States to conserve energy"), the U.S. Court of Appeals for the D.C. Circuit observed in 1988 that the Department of Transportation has interpreted that language as "*requir[ing]* consideration of . . . environmental . . . implications," *Pub. Citizen v. Nat'l Highway Traffic Safety Admin*., 848 F.2d 256, 263 n.27 (D.C. Cir. 1988) (R.B. Ginsburg, J.) (quoting 42 Fed. Reg. 63,184, 63,188 (Dec. 15, 1977) and adding emphasis to the word *requires*). And the U.S. Court of Appeals for the Ninth Circuit held that the Department of Transportation's failure to monetize climate benefits explicitly in its economic assessment of vehicle efficiency standards was arbitrary and capricious. *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1203 (9th Cir. 2008); *see also id.* at 1197-98 (indicating that, due to advancements in "scientific knowledge of climate change," "[t]he need of the nation to conserve energy is even more pressing today than it was at the time of EPCA's enactment").

[12] 42 U.S.C. § 6295(o)(2)(B)(i).

[13] For suggestions on how to properly value possible efficiency effects and distributional effects to small businesses, see Inst. for Policy Integrity, Letter to the U.S. Small Business Administration, "Suggested Improvements to the Implementation of the Regulatory Flexibility Act" (Feb. 24, 2012), https://policyintegrity.org/documents/Policy_Integrity_Letter_to_SBA_on_RFA.pdf.

Department happens to arbitrarily assign controlling weight, the proposed change should not be adopted. It is inconsistent both with statutory requirements and principles of rational decisionmaking.

Besides the redefinition of "economically justified," the proposed rule also seeks to recodify two provisions in the regulatory text. One provision proposes that a standard level will not be adopted if it "is likely to result in the unavailability of any covered product/equipment type with performance characteristics . . . that are substantially the same as products generally available."[14] The second provision proposes that a standard will not be adopted if it "would not result in significant conservation of energy."[15] Though both provisions have some basis in the statute[16] and in the pre-existing regulations,[17] the Department has misinterpreted and misapplied similar language recently, and so Policy Integrity here briefly summarizes our relevant comments on these issues. The attached comments, which provide more details on these arguments, are hereby incorporated.

Concerning "unavailability," the statute sets a fairly high bar that any finding of unavailability must be established by "a preponderance of the evidence"[18]—language that does not appear in the Department's proposed provision. In determining whether other products are "substantially the same," the Department should consider that consumer preferences changes, both naturally over time and also in response to regulatory standards. When consumers are readily willing to substitute one product for another, that may constitute compelling evidence that many consumers view the products as providing substantially the same performance. Finally, in assessing whether unavailability is "likely," the Department should consider various reasonable assumptions about what the future might look like if a particular standard were implemented, including the potential for technological development. See the attached comments on the energy conservation standards for general service incandescent lamps for more details.

Concerning the "significance" of energy conservation, the Department has recently set a numerical threshold for determining "significance."[19] Setting an arbitrary numerical threshold for "significance," regardless of the costs and benefits of individual standards, makes no economic sense and is contrary to congressional intent. In recent comments, Policy Integrity identified 18 past energy conservation standards that would have fallen below the thresholds the Department has now established. Those standards collectively would have reduced over 225 million metric tons of carbon dioxide, generating billions of dollars in monetized climate benefits—on top of tens of billions of dollars in cumulative consumer benefits—resulting in tremendous net benefits for consumers and the environment. It is unreasonable to assume that a statute like the Energy Policy and Conservation Act, aimed at advancing the national need for energy conservation, would bar such standards on the grounds of insignificance. Indeed, as the U.S. Court of Appeals for the District of Columbia Circuit held, Congress did not intend for the Department to pass up an essentially "cost-free chance to save energy."[20] The D.C. Circuit elaborated that significance could be evaluated by comparing whether the "value" of the energy savings

[14] 85 Fed. Reg. at 8490.

[15] *Id.*

[16] 42 U.S.C. § 6295(o)(3) & (4).

[17] *See* 10 C.F.R. pt 430, Appendix A, at 5(e)(1)(ii) & (iii) (1996).

[18] 42 U.S.C. § 6295(o)(4).

[19] 85 Fed. Reg. 8626 (Feb. 14, 2020).

[20] *NRDC v. Herrington*, 768 F.2d 1355, 1373 (D.C. Cir. 1985) ("We think it unlikely that the Congress that enacted NECPA and its four related energy statutes intended DOE to throw away a cost-free chance to save energy unless the amount of energy saved was genuinely trivial.").

"outweighed" the "cost."[21] Indeed, "significance" should be assessed by comparing costs and benefits, because "whether it is 'reasonable' to bear a particular cost may well depend on the resulting benefits."[22] See the attached comments on the Process Rule and notice of data availability for more details.

Sincerely,
Jason A. Schwartz, Legal Director
Institute for Policy Integrity
jason.schwartz@nyu.edu

Attached:

Policy Integrity's Comments on Energy Conservation Program: Energy Conservation Standards for General Service Incandescent Lamps (84 Fed. Reg. 46,830, Sept. 5, 2019), *available at* https://policyintegrity.org/documents/DOE_GSIL_Standards_Comments_2019.11.04.pdf.

Policy Integrity's Comments on Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, *available at* https://policyintegrity.org/documents/DOE_Process_Rule_Comments_2019.5.6_final.pdf.

Policy Integrity's Comments on Notice of Data Availability for the Process Rule, *available at* https://policyintegrity.org/documents/Institute_for_Policy_Integrity_DOE_Process_Rule_NODA_Comments.pdf.

[21] *Id.* at 1373, n.19 (discussing administrative costs and other costs, and concluding that "If . . . the value of saving small amounts of energy was outweighed by the cost and trouble of undertaking any appliance program at all, DOE might be justified in determining that those small savings were not significant.").

[22] *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1506, 1510 (2009).